

**ASSEMBLY BILL**

**No. 328**

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**Introduced by Assembly Member Smyth**

February 10, 2011

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An act to amend Section 998 of, and to add Chapter 3.4 (commencing with Section 1000) to Title 14 of Part 2 of, the Code of Civil Procedure, relating to inverse condemnation.

LEGISLATIVE COUNSEL'S DIGEST

AB 328, as introduced, Smyth. Inverse condemnation: comparative fault.

(1) Existing law prohibits the taking of private property without the payment of just compensation and permits a person to maintain an action in inverse condemnation for the purpose of obtaining compensation for a taking. Existing law applies the doctrine of comparative fault for the purpose of apportioning responsibility and reducing damages to the extent a plaintiff is found partially at fault.

This bill would apply the doctrine of comparative fault to inverse condemnation actions and would require a court or arbitrator to reduce the compensation paid to a plaintiff in an inverse condemnation proceeding, in direct proportion to his or her percentage of fault, if any, in the damaging of property that constitutes a taking.

(2) Existing law governs offers by a party to compromise a dispute that is to be resolved by trial or arbitration. Existing law provides in this regard, among other things, that if defendant makes an offer that the plaintiff does not accept, and the plaintiff fails to obtain a more favorable judgment or award, the plaintiff is prohibited from recovering his or her postoffer costs and is required to pay the defendant's costs

from the time of the offer. Existing law excepts eminent domain proceedings from these provisions.

This bill would specify that the provisions described above apply to an inverse condemnation action for the purpose of reducing compensation to be paid to a plaintiff, regardless of whether the plaintiff is entitled to recover costs.

Vote: majority. Appropriation: no. Fiscal committee: no.  
State-mandated local program: no.

*The people of the State of California do enact as follows:*

1 SECTION 1. Section 998 of the Code of Civil Procedure is  
2 amended to read:

3 998. (a) The costs allowed under Sections 1031 and 1032 shall  
4 be withheld or augmented as provided in this section.

5 (b) Not less than 10 days prior to commencement of trial or  
6 arbitration (as provided in Section 1281 or 1295) of a dispute to  
7 be resolved by arbitration, any party may serve an offer in writing  
8 upon any other party to the action to allow judgment to be taken  
9 or an award to be entered in accordance with the terms and  
10 conditions stated at that time. The written offer shall include a  
11 statement of the offer, containing the terms and conditions of the  
12 judgment or award, and a provision that allows the accepting party  
13 to indicate acceptance of the offer by signing a statement that the  
14 offer is accepted. Any acceptance of the offer, whether made on  
15 the document containing the offer or on a separate document of  
16 acceptance, shall be in writing and shall be signed by counsel for  
17 the accepting party or, if not represented by counsel, by the  
18 accepting party.

19 (1) If the offer is accepted, the offer with proof of acceptance  
20 shall be filed and the clerk or the judge shall enter judgment  
21 accordingly. In the case of an arbitration, the offer with proof of  
22 acceptance shall be filed with the arbitrator or arbitrators who shall  
23 promptly render an award accordingly.

24 (2) If the offer is not accepted prior to trial or arbitration or  
25 within 30 days after it is made, whichever occurs first, it shall be  
26 deemed withdrawn, and cannot be given in evidence upon the trial  
27 or arbitration.

28 (3) For purposes of this subdivision, a trial or arbitration shall  
29 be deemed to be actually commenced at the beginning of the

1 opening statement of the plaintiff or counsel, and if there is no  
2 opening statement, then at the time of the administering of the oath  
3 or affirmation to the first witness, or the introduction of any  
4 evidence.

5 (c) (1) If an offer made by a defendant is not accepted and the  
6 plaintiff fails to obtain a more favorable judgment or award, the  
7 plaintiff shall not recover his or her postoffer costs and shall pay  
8 the defendant's costs from the time of the offer. In addition, in any  
9 action or proceeding other than an eminent domain action, the  
10 court or arbitrator, in its discretion, may require the plaintiff to  
11 pay a reasonable sum to cover costs of the services of expert  
12 witnesses, who are not regular employees of any party, actually  
13 incurred and reasonably necessary in either, or both, preparation  
14 for trial or arbitration, or during trial or arbitration, of the case by  
15 the defendant.

16 (2) (A) In determining whether the plaintiff obtains a more  
17 favorable judgment, the court or arbitrator shall exclude the  
18 postoffer costs.

19 (B) It is the intent of the Legislature in enacting subparagraph  
20 (A) to supersede the holding in *Encinitas Plaza Real v. Knight*,  
21 209 Cal.App.3d 996, that attorney's fees awarded to the prevailing  
22 party were not costs for purposes of this section but were part of  
23 the judgment.

24 (d) If an offer made by a plaintiff is not accepted and the  
25 defendant fails to obtain a more favorable judgment or award in  
26 any action or proceeding other than an eminent domain action, the  
27 court or arbitrator, in its discretion, may require the defendant to  
28 pay a reasonable sum to cover postoffer costs of the services of  
29 expert witnesses, who are not regular employees of any party,  
30 actually incurred and reasonably necessary in either, or both,  
31 preparation for trial or arbitration, or during trial or arbitration, of  
32 the case by the plaintiff, in addition to plaintiff's costs.

33 (e) If an offer made by a defendant is not accepted and the  
34 plaintiff fails to obtain a more favorable judgment or award, the  
35 costs under this section, from the time of the offer, shall be  
36 deducted from any damages awarded in favor of the plaintiff. If  
37 the costs awarded under this section exceed the amount of the  
38 damages awarded to the plaintiff the net amount shall be awarded  
39 to the defendant and judgment or award shall be entered  
40 accordingly.

(f) Police officers shall be deemed to be expert witnesses for the purposes of this section. For purposes of this section, “plaintiff” includes a cross-complainant and “defendant” includes a cross-defendant. Any judgment or award entered pursuant to this section shall be deemed to be a compromise settlement.

(g) *Notwithstanding any other law, this section applies to an action in inverse condemnation for the purpose of reducing compensation to be paid to a plaintiff, regardless of whether the plaintiff is entitled to recover costs pursuant to Section 1036.*

~~(g)~~  
(h) This chapter does not apply to either of the following:  
(1) An offer that is made by a plaintiff in an eminent domain action.

(2) Any enforcement action brought in the name of the people of the State of California by the Attorney General, a district attorney, or a city attorney, acting as a public prosecutor.

~~(h)~~  
(i) The costs for services of expert witnesses for trial under subdivisions (c) and (d) shall not exceed those specified in Section 68092.5 of the Government Code.

~~(i)~~  
(j) This section shall not apply to labor arbitrations filed pursuant to memoranda of understanding under the Ralph C. Dills Act (Chapter 10.3 (commencing with Section 3512) of Division 4 of Title 1 of the Government Code).

SEC. 2. Chapter 3.4 (commencing with Section 1000) is added to Title 14 of Part 2 of the Code of Civil Procedure, to read:

CHAPTER 3.4. COMPARATIVE FAULT IN INVERSE  
CONDEMNATION

1000. (a) As described in this chapter, the doctrine of comparative fault applies to actions in inverse condemnation.

(b) In an inverse condemnation proceeding, a court or arbitrator shall reduce the compensation to be paid to a plaintiff in direct proportion to his or her percentage of fault, if any, in the damaging of property that constitutes a taking for a public use.